Ali Reza Ziba Halat Monfared & Anor v Chew Ben Ben & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCvC-506–09 OF 2017
MOHD JOHAN LEE J
1 SEPTEMBER 2023

Land Law — Power of attorney — Validity — Second plaintiff claimed that he had valid power of attorney given by first plaintiff — First plaintiff's land transferred to first and second defendants without second plaintiff's involvement — Second plaintiff filed action on behalf of himself and on behalf of first plaintiff contending that he had valid power of attorney — Second plaintiff filed action premised on conspiracy to injure — Whether power of attorney valid — Whether attestation of power of attorney complied with s 3(1)(a) of Powers of Attorney Act 1949 ('Act 424') and Form I of First Schedule of Act 424 — Whether there was consideration in power of attorney — Whether second plaintiff had locus standi to file action on his own behalf and on behalf of first plaintiff — Whether sale and purchase agreement and Form 14A were valid — Whether there was breach of s 211 of National Land Code — Whether first and second defendants' title to property was indefeasible — Interpretation Acts 1948 and 1967 s 62 — National Land Code ss 211, 340(1) & Form 14A — Powers of Attorney Act 1949 s 3(1)(a) & Form I

Tort — Conspiracy — Conspiracy to injure plaintiff — Second plaintiff claimed that he had valid power of attorney given by first plaintiff — First plaintiff's land transferred to first and second defendants without second plaintiff's involvement — Second plaintiff filed action on behalf of himself and on behalf of first plaintiff contending that he had valid power of attorney — Second plaintiff filed action premised on conspiracy to injure — Whether elements to claim for conspiracy were established — Whether claim for conspiracy to injure actionable

The second plaintiff in the present case was dissatisfied with the transfer of the first plaintiff's property to the first and second defendants via a sale and purchase agreement ('the SPA') and Form 14A of the National Land Code ('the NLC') which was witnessed by the third defendant. The second plaintiff had also disputed the appointment of the fourth defendant as the first plaintiff's attorney. The second plaintiff in his own capacity and on behalf of the first plaintiff then filed a suit ('this action') against all the defendants claiming that he had the valid power of attorney of the first plaintiff (dated 17 March 2015) ('the impugned PA') and that without his involvement, the transfer perfected was invalid. The second plaintiff argued that the defendants had committed fraud and conspiracy to injure. The issues arose were: (a) whether the

impugned PA was valid; (b) if yes, whether the SPA and Form 14A were null and void; and (c) whether the claim for conspiracy to injure was actionable.

Held, dismissing the plaintiffs' claim with costs of RM65,000 to be paid by the plaintiffs to the first and second defendants, and costs of RM60,000 to be paid by the plaintiffs to the third and fourth defendants respectively, all costs were subject to allocatur:

(1) Section 62 of the Interpretation Acts 1948 and 1967 ('Act 388') only allowed for deviations from any forms so long as the deviation had no substantial effect. In the present case, it was clear that the attestation of the impugned PA had substantially deviated from Form I of First Schedule of the Powers of Attorney Act 1949 ('Act 424') and as required under s 3(1)(a) of Act 424 because most, if not all, of the key components of the attestation stated in Form I had been missing in the attestation of the impugned PA. Therefore, s 62 of Act 388 could not shield the impugned PA from the fate of being null and void in view that the attestation clause contained therein had deviated substantially from Form I (see paras 21 & 44).

(2) On a plain reading of the impugned PA, the court found that the impugned PA was again invalid because despite it being an irrevocable power coupled with interest of the property, there was no mention of the consideration at all. The impugned PA did not state anything to indicate the consideration based on which it was given, let alone stating anything to suggest that it was given: (a) in consideration that (as alleged) the second plaintiff advanced USD17m to the first plaintiff; and (b) as security for the moneys so advanced. Further, as the nature and extent of all the powers and terms were contained in the impugned PA, s 92 of the Evidence Act 1950 barred any oral evidence to contradict, vary, add to, or subtract from the express terms of the written document (see paras 48–49, 57 & 60).

(3) There was no concrete proof to show that the impugned PA was signed by the first plaintiff on 17 March 2015. Further, the first plaintiff via a statutory declaration dated 14 September 2016 ('the SD') had categorically declared and averred that he did not grant any power of attorney to the second plaintiff. The validity of the SD was not challenged by the second plaintiff. The burden was on the second plaintiff to prove the validity of the impugned PA. The second plaintiff had failed to do so. Thus, the second plaintiff had failed to establish his claim on the balance of probabilities. Considering that the impugned PA was null and void, as such, the second plaintiff had never been appointed the attorney of the first plaintiff and he thus had no legal authorities to file this action on behalf of the first plaintiff (see paras 69, 75–76, 78 & 81).

(4) If the second plaintiff was commencing this action on behalf of the first plaintiff by virtue of the impugned PA, this action should be brought in the donor's name, that was the first plaintiff's name. It did not give the second plaintiff the power to commence this action in his own name. The impugned PA therefore only gave the second plaintiff the authority to deal with the first plaintiff's assets and did not in any way whatsoever secure any personal benefit and rights of the second plaintiff over the property. To be able to sue in his own capacity, the second plaintiff must establish that he had personal benefit and rights over the property that he must secure. This, he had failed to do. Therefore, the commencement of this action was wrong on all counts (see paras 89–90).

(5) Since the second plaintiff accepted that the first plaintiff had in fact signed Form 14A in the third defendant's presence, the mischief and purpose of s 211 of the NLC had been fulfilled. Moreover, the transferor who had executed the form (Form 14A) never denied that he had executed the form and had indeed confirmed via the video recording that he was happy to transfer the property. He had even wished the transferees (first and second defendants) the best. Accordingly, there was no breach of s 211 of the NLC and Form 14A was therefore a valid instrument, and once registered it had become indefeasible under s 340(1) of the NLC, in favour of the first and second defendants. Hence, the first and second defendants had the indefeasible title to the property (see para 102).

(6) It ought to be noted that for any claim under conspiracy, it must be strictly pleaded, and each element of the tort must be fully particularised. In the present case, the first plaintiff was not named as a co-conspirator together with the defendants and the first plaintiff did not testify at trial to substantiate the second plaintiff's allegations in the statement of claim. Nor had the second plaintiff produced any evidence to substantiate his accusation (see paras 104 & 107).

(7) The burden was on the second plaintiff to prove that there was an intention to injure by the fourth defendant together with the other defendants. Nevertheless, the court found that the claim for conspiracy to defraud was not actionable because the second plaintiff had failed to prove the elements to a conspiracy claim. Based on the extensive evidence, the first plaintiff and the defendants had acted lawfully in the conveyancing transaction in effecting the transfer of the property to the first and second defendants in consideration of RM15m. In addition, the third defendant had attended to the drafting, preparation and execution of the SPA and Form 14A for the sale of the property in good faith for the legitimate purpose of acting pursuant to and in accordance with the first plaintiff's instructions to sell the property to the first and second defendants. The fourth defendant, on the other hand, had been authorised as the attorney of the first plaintiff. All of them had performed

their respective roles and duties with legitimate causes. Hence, there was no basis/evidence to support the accusation that the defendants had conspired to injure the second plaintiff. In any event, as the second plaintiff did not have any security rights on the property, there was simply nothing to injure the second plaintiff (see paras 109–111).

[Bahasa Malaysia summary

Plaintif kedua dalam kes ini tidak berpuas hati dengan pemindahan harta plaintif pertama kepada defendan pertama dan kedua melalui satu perjanjian jual beli ('SPA') dan Borang 14A Kanun Tanah Negara ('KTN') yang telah disaksikan oleh defendan ketiga. Plaintif kedua juga telah mempertikaikan pelantikan defendan keempat sebagai wakil plaintif pertama. Plaintif kedua atas kapasitinya sendiri dan bagi pihak plaintif pertama kemudian memfailkan saman ('tindakan ini') terhadap semua defendan atas dakwaan bahawa dia mempunyai surat kuasa wakil yang sah bagi plaintif pertama (bertarikh 17 Mac 2015) ('SKW yang dipertikaikan') dan tanpa penglibatannya, pemindahan yang disempurnakan adalah tidak sah. Plaintif kedua berhujah bahawa defendan-defendan telah melakukan penipuan dan konspirasi untuk mencederakan. Isu-isu yang timbul ialah: (a) sama ada SKW yang dipertikaikan tersebut adalah sah; (b) jika ya, sama ada SPA dan Borang 14A tersebut adalah terbatal dan tidak sah; dan (c) sama ada tuntutan untuk konspirasi untuk mencederakan boleh diambil tindakan.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos RM65,000 yang perlu dibayar oleh plaintif-plaintif kepada defendan pertama dan kedua, dan kos RM60,000 yang perlu dibayar oleh plaintif-plaintif kepada defendan ketiga dan keempat masing-masing, semua kos adalah tertakluk kepada allocatur:

(1) Seksyen 62 Akta Tafsiran 1948 dan 1967 ('Akta 388') hanya membenarkan lencongan daripada apa-apa borang selagi lencongan tersebut tidak mempunyai kesan yang ketara. Dalam kes ini, adalah jelas bahawa perakuan SKW yang dipertikaikan telah melencong dengan ketara daripada Borang I Jadual Pertama Akta Surat Kuasa Wakil 1949 ('Akta 424') dan seperti yang dikehendaki di bawah s 3(1)(a) Akta 424 kerana kebanyakan, jika tidak semua, komponen utama perakuan yang dinyatakan dalam Borang I telah hilang dalam perakuan SKW yang dipertikaikan. Oleh itu, s 62 Akta 388 tidak dapat melindungi SKW yang dipertikaikan tersebut daripada nasib menjadi batal dan tidak sah memandangkan klausa perakuan yang terkandung di dalamnya telah melencong dengan ketara daripada Borang I (lihat perenggan 21 & 44).

(2) Pada bacaan biasa SKW yang dipertikaikan tersebut, mahkamah mendapati bahawa SKW yang dipertikaikan tersebut sekali lagi tidak sah kerana walaupun ia merupakan kuasa yang tidak boleh ditarik balik ditambah dengan kepentingan harta tersebut, tidak disebut sama sekali

mengenai balasan. SKW yang dipertikaikan tersebut tidak menyatakan apa-apa untuk menunjukkan balasan bagi pemberiannya, apatah lagi menyatakan apa-apa yang mencadangkan bahawa ia telah diberikan: (a) dengan balasan bahawa (seperti yang didakwa) plaintif kedua mendahulukan USD17 juta kepada plaintif pertama; dan (b) sebagai jaminan bagi wang yang didahulukan tersebut. Selanjutnya, memandangkan sifat dan takat semua kuasa dan terma terkandung dalam SKW yang dipertikaikan tersebut, s 92 Akta Keterangan 1950 menghalang apa-apa keterangan lisan untuk mencanggahi, mengubah, menambah atau menolak daripada terma-terma nyata dokumen bertulis (lihat perenggan 48–49, 57 & 60).

(3) Tiada bukti konkrit untuk menunjukkan bahawa SKW yang dipertikaikan tersebut telah ditandatangani oleh plaintif pertama pada 17 Mac 2015. Selanjutnya, plaintif pertama melalui akuan berkanun bertarikh 14 September 2016 ('AB tersebut') telah mengisytiharkan dan menyatakan bahawa dia tidak memberikan apa-apa surat kuasa wakil kepada plaintif kedua. Kesahihan AB tersebut tidak dicabar oleh plaintif kedua. Beban terletak pada plaintif kedua untuk membuktikan kesahihan SKW yang dipertikaikan tersebut. Plaintif kedua telah gagal berbuat demikian. Oleh itu, plaintif kedua telah gagal untuk membuktikan tuntutannya di atas imbangan kebarangkalian. Memandangkan SKW yang dipertikaikan adalah batal dan tidak sah, oleh itu, plaintif kedua tidak pernah dilantik sebagai wakil kepada plaintif pertama dan oleh itu dia tidak mempunyai kuasa yang sah untuk memfailkan tindakan ini bagi pihak plaintif pertama (lihat perenggan 69, 75–76, 78 & 81).

(4) Jika plaintif kedua memulakan tindakan ini bagi pihak plaintif pertama berdasarkan SKW yang dipertikaikan tersebut, tindakan ini hendaklah dibawa atas nama 'donor', iaitu nama plaintif pertama. Ia tidak memberikan plaintif kedua kuasa untuk memulakan tindakan ini atas namanya sendiri. Oleh itu, SKW yang dipertikaikan tersebut hanya memberi plaintif kedua kuasa untuk berurusan dengan aset plaintif pertama dan tidak dalam apa-apa cara sekalipun menjamin apa-apa kepentingan peribadi dan hak plaintif kedua ke atas harta tersebut. Untuk dapat menyaman atas kapasitinya sendiri, plaintif kedua mesti memastikan bahawa dia mempunyai kepentingan peribadi dan hak yang mesti dijaga ke atas harta tersebut. Ini, gagal dilakukan olehnya. Oleh itu, pemfailan tindakan ini adalah salah dalam semua keadaan (lihat perenggan 89–90).

(5) Memandangkan plaintif kedua menerima bahawa plaintif pertama sebenarnya telah menandatangani Borang 14A di hadapan defendan ketiga, kesalahan yang ingin ditangani dan tujuan s 211 KTN telah dipenuhi. Lebih-lebih lagi, pemindah yang telah menyempurnakan

borang (Borang 14A) tidak pernah menafikan bahawa dia telah menyempurnakan borang tersebut dan sememangnya telah mengesahkan melalui rakaman video bahawa dia gembira untuk memindahkan harta tersebut. Malah dia juga mendoakan yang terbaik kepada penerima pindahan (defendan pertama dan kedua). Sehubungan itu, tiada pelanggaran s 211 KTN dan oleh yang demikian, Borang 14A tersebut adalah instrumen yang sah, dan setelah didaftarkan ia telah menjadi tidak boleh disangkal di bawah s 340(1) KTN, memihak kepada defendan pertama dan kedua. Oleh itu, defendan pertama dan kedua mempunyai hak milik yang tidak boleh disangkal ke atas harta tersebut (lihat perenggan 102).

(6) Perlu diingatkan bahawa bagi apa-apa tuntutan di bawah konspirasi, ia perlu diplid dengan tegas, dan setiap elemen tort mesti diperincikan sepenuhnya. Dalam kes ini, plaintif pertama tidak dinamakan sebagai pekomplot bersama dengan defendan-defendan dan plaintif pertama tidak memberi keterangan semasa perbicaraan untuk mengesahkan dakwaan plaintif kedua dalam pernyataan tuntutannya. Plaintif kedua juga tidak mengemukakan apa-apa keterangan untuk menyokong dakwaannya (lihat perenggan 104 & 107).

(7) Beban adalah pada plaintif kedua untuk membuktikan bahawa terdapat niat untuk mencederakan oleh defendan keempat bersama dengan defendan-defendan lain. Namun begitu, mahkamah mendapati tuntutan konspirasi untuk menipu tidak boleh diambil tindakan kerana plaintif kedua gagal membuktikan elemen-elemen tuntutan konspirasi. Berdasarkan keterangan yang meluas, plaintif pertama dan defendan-defendan telah bertindak secara sah dalam urus niaga pemindahhakan dalam melaksanakan pemindahan harta kepada defendan pertama dan kedua dengan balasan RM15 juta. Di samping itu, defendan ketiga telah menghadiri penggubalan, penyediaan dan pelaksanaan SPA dan Borang 14A tersebut untuk penjualan harta tersebut dengan suci hati untuk tujuan yang sah iaitu bertindak menurut dan mengikut arahan plaintif pertama untuk menjual harta tersebut kepada defendan pertama dan kedua. Defendan keempat pula telah diberi kuasa sebagai wakil kepada plaintif pertama. Kesemua mereka telah melaksanakan peranan dan tugas masing-masing dengan sebab yang sah. Oleh itu, tiada asas/keterangan untuk menyokong dakwaan bahawa defendan-defendan telah berkomplot untuk mencederakan plaintif kedua. Walau apa pun, memandangkan plaintif kedua tidak mempunyai apa-apa hak jaminan ke atas harta tersebut, tiada apa-apa yang boleh mencederakan plaintif kedua (lihat perenggan 109–111).]

Cases referred to

Bryant, Powis and Bryant v La Banque du Peuple; Bryant Powis and Bryant v Quebec Bank [1893] AC 170, PC (refd)

Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal [2016] 3 MLJ 797, CA (refd)
Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor [2013] 7 MLJ 437, HC (refd)
Faridah bt Md Lazim (as the lawful holder of the power of attorney to Ahmad bin Adam) v Edham bin Abd Ghani (as the lawful Administrator to the estate of Abdul Ghani bin Mohamed Don, deceased) [2021] MLJU 588; [2021] 1 LNS 451, HC (refd)
Hassnar bin MP Ebrahim @ Asainar v Sulaiman bin Pong & Ors [2018] 1 MLJ 346, CA (refd)
He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal [2020] 4 MLJ 662; [2020] 7 CLJ 271, FC (refd)
KHK Development Sdn Bhd v Majlis Perbandaran Padawan [2021] MLJU 97, HC (refd)
Kenanga Investment Bank Bhd v Swee Joo Bhd & Ors and another appeal [2017] MLJU 2095; [2017] 1 LNS 2086, CA (distd)
Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (folld)
Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor [2011] 1 MLJ 486, CA (refd)
Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor [2013] 3 MLJ 161, FC (refd)
Loh Chun Hoo v Loh Chun Hoo & Ors [2022] 1 LNS 25, HC (refd)
Ong Seok Fong & Ors v Ng Tong Lai & Anor [2022] MLJU 765; [2022] 1 LNS 771, HC (refd)
Rajamani a/p Meyappa Chettiar v Eng Beng Development Sdn Bhd & Ors [2021] MLJU 2648; [2021] 1 LNS 2233, HC (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)
Repco (M) Sdn Bhd v Tan Toh Fatt & Ors [2013] 7 MLJ 408, HC (refd)
Sidambaram a/l Torosamy v Lok Bee Yeong (representative to the estate of Soma Sundram a/l Doraiswamy) [2017] 4 MLJ 570, CA (refd)
Subramania Pillay v Sundarammal [1968] 2 MLJ 115, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (folld)
Wee Huay Fong v Pentadbir Tanah, Klang & Anor [2002] 3 MLJ 572, HC (refd)
Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors [1989] 1 MLJ 252, HC (refd)
Wee Tiang Peck v Teoh Poh Tin [1995] 1 MLJ 446, HC (folld)

Legislation referred to

Contracts Act 1950
Evidence Act 1950 s 92
Interpretation Acts 1948 and 1967 s 62

Land Code (Cap 81) s 112(3)
National Land Code ss 211, 340(1), Forms 14A, 16A
Powers of Attorney Act 1949 s 3, 3(1)(a), (1)(b), (2), First Schedule, Form I

Michael Chow (with Neoh Kai Sheng) (Michael Chow) for the plaintiff.
Chong Ki Keong (with Hazalina Haron) (KK Chong & Co) for the first and second defendants.
Mark Lau (with Talitha Shim) (Sreenevasan & Young) for the third defendant.
Tan Keng Teck (with Ung Zhee Laine) (Lim Kian Leong & Co) for the fourth defendant.

Mohd Johan Lee J:

INTRODUCTION

[1] Manoj Singh ('the second plaintiff') came to know that a property of Ali Reza ('the first plaintiff') in Ampang, Kuala Lumpur was transferred to Chew Ben Ben ('the first defendant') and his wife Zhao Tong ('the second defendant') witnessed by Kevin Sathiaseelan ('the third defendant'). The first plaintiff had also, allegedly, given a power of attorney appointing Dato' Syed Alwi ('the fourth defendant') as his attorney. Dissatisfied with this, the second plaintiff in his own capacity and on behalf of the first plaintiff then filed a suit ('this action') against all the defendants claiming that he has the valid power of attorney of the first plaintiff. He also alleged that without his involvement, the transfer perfected was invalid.

[2] From the time this action was filed up until the date of this grounds of judgment, the plaintiff, an Iranian national, has been serving time in an Iranian jail. The first plaintiff had previously spent sometimes in Malaysia and was bestowed a Datukship during the time here. This judgment is delivered after the full trial conducted pertaining to this action in which the second plaintiff alleged that the defendants had committed fraud and conspiracy to injure.

FACTS OF THE CASE

[3] The first plaintiff was formerly the registered proprietor of all that piece of property held under Title No PN 35412, Lot 9517, Mukim Ampang, Daerah Kuala Lumpur, Negeri Wilayah Persekutuan, Kuala Lumpur and bearing postal address at Lot No 9, Jalan Keranji 2 of Jalan Kedondong, Taman Tasik Ampang, Ampang Hilir, 55000 Kuala Lumpur ('the property').

[4] The second plaintiff is a Malaysian citizen and is said to be the lawful attorney of the first plaintiff in respect of the property pursuant to the alleged power of attorney registered in the High Court of Ipoh under registration No 4396/2015 ('the impugned PA').

[5] The first and second defendants are married couple and are the current registered proprietors of the property. The third and fourth defendants are advocates and solicitors.

[6] The second plaintiff alleged that the impugned PA was executed by the first plaintiff, which among others, had assigned to the second plaintiff any and/or all of the first plaintiff's present or contingent rights to deal with all of his real estate including but not limited to all dealings over the property.

[7] The second plaintiff subsequently discovered that the property, in breach of the Impugned PA, was transferred to the first and second defendants pursuant to a sale and purchase agreement dated 23 March 2016 ('the SPA').

[8] The plaintiffs therefore, through this action, claimed for, inter alia:

(a) a declaration that the SPA is null, void and unenforceable;

(b) a declaration that any title and/or inte rest acquired by the first and second defendant in the property is defeasible and be set aside; and

(c) a declaration that any rights or dealings stemming from the SPA including but not limited to any application of loans, charges, caveats and/or assignment is null, void and unenforceable.

THE PLAINTIFF'S CASE

[9] It is to be noted that the first plaintiff never appeared nor attended any of the proceedings. He is said to be imprisoned in an Iranian jail. His action here is said to be initiated on his behalf by the second plaintiff. The second plaintiff hinged his submissions on four key arguments namely:

(a) that the second plaintiff has locus standi to commence this action in his own name and in the first plaintiff's name;

(b) that the SPA is a void agreement;

(c) that the transfer form, namely, Form 14A ('Form 14A') of the National Land Code ('the NLC') registering the transfer of the property is a void instrument under the NLC;

(d) that the power of attorney dated 15 August 2016 ('the fourth defendant's PA') is null and void because the first plaintiff was not in the Commonwealth of Dominican on the said date, having left the country since 16 July 2016; and

(e) that all the defendants had unlawfully conspired to injure the second plaintiff.

THE DEFENDANTS' CASE

[10] At all material time, the defendants stand firm by their defence that the impugned PA is invalid for want of meticulous authentication as prescribed in law, and in turn, this action fails in limine. The impugned PA, being irrevocable in nature, is also invalid for want of consideration.

[11] The defendants further submitted that even if this court find that the impugned PA is valid, the impugned PA does not authorize the second plaintiff to commence this action in his own name and in the first plaintiff's name to recover the property on behalf of the latter.

THE TRIAL

[12] The second plaintiff called seven witnesses during trial. The second plaintiff himself testified as PW7. Meanwhile, the defendants called upon a total of four witnesses. This includes the first defendant himself ('DW2'), third defendant ('DW3') and the fourth defendant ('DW4').

ISSUES

[13] Despite the abundance issues agreed upon by all parties before the trial, I find that the primary decisive issues in this case are:

(a) whether the impugned PA is valid;

(b) if yes, whether the SPA and Form 14A are null and void; and

(c) whether the claim for conspiracy to injure is actionable.

FINDINGS OF THE COURT

[14] After perusing the evidence and testimonies tendered throughout the trial and the submissions by the parties, I hold that the plaintiffs' claim be dismissed with costs. Herein are my reasons.

Impugned PA

[15] Before this court consider the plaintiffs' claim against the defendants, it is necessary for this court to ascertain whether the second plaintiff has locus standi to initiate this action.

[16] After a thorough perusal of the statement of claim ('the SOC'), it is crystal clear that the second plaintiff initiated this action based on the impugned PA which allegedly vested in him such power to commence this action. The SOC (encl 262, p 18) says:

This action is commenced by the second plaintiff in his own name and in the name of the first plaintiff *pursuant to the said PA*. (Emphasis added.)

[17] To rebut, the defendants insisted that the impugned PA is invalid in the eye of law and was only created by second plaintiff for his personal interests. Thus, the second plaintiff has no locus standi to file this action. Since the heart of this action hinges on the validity of the impugned PA and the locus standi of the second plaintiff, I shall first focus on the legal issues surrounding them.

[18] It is the defendants' case that if the impugned PA is invalid in law, or if the impugned PA on its true construction does not support the rights asserted by the second plaintiff (as an assignee and security holder), this action must be dismissed.

[19] The second plaintiff alleged that the impugned PA was executed by the first plaintiff in March, 2015, which among others, had assigned to the second plaintiff any and/or all of the first plaintiff's present or contingent rights to deal with his real estate including but not limited to the property.

[20] However, the defendants challenged the validity of the impugned PA from five different aspects:

(a) that the form of authentication in the impugned PA does not comply with the requirements of s 3(1)(a) and Form I of First Schedule of the Powers of Attorney Act 1949 ('the Act');

(b) that the impugned PA can only be interpreted from considering what is contained within the four walls of the document. That is to say, no parol evidence is to be permitted on the terms and conditions of the impugned PA;

(c) that, in any event, the parol evidence which the second plaintiff seeks to admit are not credible;

(d) that the second plaintiff is estopped and/or precluded from asserting the impugned PA; and

(e) that the impugned PA being an irrevocable power of attorney is void for the lack of consideration.

Authentication

[21] The crux of the defendants' argument is that the impugned PA is invalid due to various reasons. After analysing all of them, I have to agree with the defendants that the impugned PA is indeed invalid. Among others, it is the

defendants' case that it was not properly authenticated pursuant to s 3 of the Act.

[22] The defendants premised that the impugned PA was not properly authenticated as per Form I of the First Schedule of the Act ('Form I'). Compliance with Form I is made mandatory by s 3(1)(a) of the Act failing which the power of attorney is invalid. For the ease of reference, s 3(1)(a) of the Act is reproduce here:

> (1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within **Peninsular Malaysia unless —
>
> (a) if executed within *Peninsular Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by —

[23] I am guided by the Apex Court's judgment of *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ 697, where Jeffrey Tan FCJ held that (at p 721, para F-G):

> [13] *Section 3(2) of the PA Act provides that in order to have validity, a power of attorney must have a form of authentication, which must be 'meticulously complied with'* (see *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* [2011] 1 MLJ 486 at p 505 per Low Hop Bing JCA). *The want of a form of authentication 'would render the instrument invalid'* (L*im Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* at p 533 per Zaharah Ibrahim JCA as she then was)
>
> ... The trial court could not say that the impugned PA was valid in a vacuum, without reference to the PA Act. On the validity of the impugned PA, the provisions of the PA Act could not be ignored. *Since the impugned PA lacked the required form of authentication, it had no validity, that is, even if the alleged signature of the first appellant on the impugned PA were genuine*. That was the effect of s 3 of the PA Act. (Emphasis added.)

[24] Also, the judgment of the Court of Appeal in *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* [2011] 1 MLJ 486 is instructive: 'the use of the appropriate form is therefore not an option. Neither are the forms mere examples.' On appeal, the Federal Court (in *Lim Eng Chuan Sdn Bhd v United Malayan Banking Corp & Anor* [2013] 3 MLJ 161) upheld the Court of Appeal's decision. Relevantly the Federal Court reinforced the legal proposition of '...scrupulous compliance with the form of authentication' in respect of a power of attorney.

[25] To rebut, the plaintiffs' argued that this court should not entertain the contention on the validity of the authentication clause. It is the registrar and not the trial court who shall determine if the authentication clause can be accepted. The plaintiffs cited the judgment in *Faridah bt Md Lazim (as the lawful holder of the power of attorney to Ahmad bin Adam) v Edham bin Abd Ghani (as the lawful Administrator to the estate of Abdul Ghani bin Mohamed Don, deceased)* [2021] MLJU 588; [2021] 1 LNS 451 as authority regarding this.

[26] With respect, this argument is flawed. The case of *Faridah bt Md Lazim* cited by the plaintiffs is a case dealing with the authentication clause under s 3(1)(b) for a power of attorney executed outside the peninsular of Malaysia. Under s 3(1)(b), it is clear that for a power of attorney executed *outside* the peninsular of Malaysia, when the registrar is satisfied with the wordings of the authentication clause, he may register the same. This is not the case for authentication clause under s 3(1)(a) as in our present case. Under s 3(1)(a), for all powers of attorney executed *within* peninsular of Malaysia, the authentication clause must strictly follow the exact wordings of Form I. The non-compliance of this would render the power of attorney null and void. That is the undisputed legal position through s 3(1)(a) and all the decided cases mentioned above.

[27] The plaintiffs further postulated that even assuming that the authentication in the impugned PA is irregular, the deed having been registered and accepted by the registrar remains valid unless revoked as decided by the Court of Appeal in *Kenanga Investment Bank Bhd v Swee Joo Bhd & Ors and another appeal* [2017] MLJU 2095; [2017] 1 LNS 2086. Hence, the plaintiffs added that the defendants have no locus to challenge, nor do the plaintiffs have the legal or evidential burden to establish, the validity of the impugned PA. It is a matter between the first plaintiff as the donor and the second plaintiff as the donee. The requirement in essence is just the embodiment of the doctrine of *res inter alios acta* (not the concern of others). Based on *Kenanga Investment Bank*, the plaintiffs argued that even though the authentication clause was arguably irregular, the impugned PA remains valid.

[28] I find this argument erroneous. In *Kenanga Investment Bank*, the court was again dealing with the power of attorney executed outside peninsular Malaysia (in Sarawak) which comes under s 3(1)(b) of the Act, where there is no specific prescribed form of authentication. Our present case is totally distinguishable from *Kenanga Investment Bank* because the impugned PA was executed within Peninsular Malaysia and s 3(1)(a) has made compliance with the authentication clause stated in Form I mandatory.

[29] The plaintiffs then asserted that the defendants' contention on the requirement of 'meticulous compliance' fails to hold water. According to the plaintiffs, whether there was meticulous compliance depends on the facts and circumstances. Any minor defect, error or imperfection will not impugn an otherwise perfectly valid authentication clause (see *Rajamani a/p Meyappa Chettiar v Eng Beng Development Sdn Bhd & Ors* [2021] MLJU 2648; [2021] 1 LNS 2233).

[30] However, as mentioned earlier, the provision of s 3(1)(a) and 3(2) could not be more lucid: non-compliance of the authentication clause as per Form I renders the power of attorney invalid. It is apt to note that in *Rajamani a/p Meyappa Chettiar*, the form of authentication used in the plaintiff's power of attorney was the full wording in the form of attestation stated in the Act without deleting any of the words therefrom. That is not what happened in our present case. Beside its failure to comply with the full wordings in the attestation stated in Form I, the attestation clause in the impugned PA does not have the three key components contained therein (which shall be discussed later). This is not something 'minor defect, error or imperfection' as alleged by the plaintiffs.

[31] I also refer to the decision of the court in *Ong Seok Fong & Ors v Ng Tong Lai & Anor* [2022] MLJU 765; [2022] 1 LNS 771 that mere addition of the words '... and that they understand the contents and effects hereof' was suffice to render the attestation invalid for the purpose of s 3(1)(a) of the Act. The defect of the attestation clause in our present case is far more serious than that: all the three key elements of the prescribed wordings in Form I are missing!! How could this be a valid power of attorney???

[32] A comparison between Form I and the impugned PA would reveal that the impugned PA does not comply with the prescribed form. In Form I, the authentication clause must carry the following:

> I ..... (Magistrate, Justice of the Peace, Land Administrator, Notary Public, Commissioner for Oaths, Bank Official or Advocate and Solicitor of the High Court in Malaya) officiating [or practising] at ....., hereby certify that the signature of the signature/thumb-mark of the donor above named was written/affixed in my presence on this ..... day of ..... 20 ....., and is, to my own personal knowledge, [or according to information given to me by trustworthy and respectable persons, namely ..... of ..... and ..... of ....., which information verily believe,] the true signature thumb-mark of ..... who has acknowledged to me that he is/is not is of full age and that he has voluntarily executed this instrument. Witness my hand .....

Meanwhile, the authentication clause in the impugned PA (exh P2) has the

following wordings:

> STATE: FEDERAL TERRITORY
>
> COUNTRY: MALAYSIA
>
> I, a Notary Public in and for said Country and State, hereby certify that ALI REZA ZIBA HALAT MONFARED GHOLAMREZA, personally appeared before me this day and acknowledged execution of the foregoing as his/her free voluntary act and deed.
>
> [*17 MAR 2015*]
>
> WITNESS my hand and notarial seal this day of 2015

[33] By this comparison, it can be clearly seen that the wordings used in both forms are completely different. Beside the differences in wordings, there are also substantive requirements in Form I which are missing from the form of authentication in the impugned PA attested by PW1. The form of authentication in Form I requires the authenticating attestor to certify three things, namely:

(a) that the donor signed his signature on the power of attorney in the presence of the attestor;

(b) that the attestor has personal knowledge that the signature is that of the donor or has relied on information given to him by a reliable and trustworthy person that the signature is that of the donor; and

(c) that the donor had acknowledged to the attestor that he is of full age and that he had voluntarily executed the said power of attorney.

[34] In the authentication of the impugned PA, PW1 did not certify that the first plaintiff had signed the impugned PA before him. There is no certification that PW1 either had personal knowledge that the signature is that of the first plaintiff or that PW1 had relied on information given to him by a reliable and trustworthy person that the signature was that of the first plaintiff. There is also no certification that the first plaintiff had acknowledged to him that the first plaintiff was of full age. All that PW1 had attested or certified was that first plaintiff had 'personally appeared before him, 'this day and acknowledged execution of the foregoing as his/her free and voluntary act and deed'. This has deviated too far from the prescribed wordings in Form I.

[35] In respect of the authentication of the impugned PA, PW1 who had attested it as a notary public, had testified under oath that he was aware that it was mandatory for a power of attorney to be used in Malaysia to follow the prescribed form of authentication (see NOP (Vol 1) p 33):

ML: Are you aware that it's mandatory for a power of attorney used in Malaysia to follow that form of authentication in the First Schedule of the Act? Are you aware?

WONG: I am aware, but I don't know the law. I am, I don't specialise in preparing.

[36] PW1 also testified during trial that if the PA was to be used in Malaysia, he would have followed the form in the Act (see NOP (Vol 1) p 36):

ML: Ok. Because if it was supposed to have been used in Malaysia, you would have followed the form provided in our 1949 Act, correct?

WONG: I, correct, I agree.

[37] This view was fortified in re-examination when PW1 testified that he would have attested the impugned PA with his capacity as advocate and solicitor rather than as notary public if he knew the impugned PA was to be used in Malaysia because 'we have to comply with the Act' (see NOP (Vol 1) p 50):

MC: So why do you say that then Mr Wong that if a document to be used in Malaysia, you would have attested it in your capacity as advocate and solicitor rather than as notary public? Why do you say that?

WONG: Because in Malaysia we have the Powers of Attorney Act. We have to comply with the act, you know.

MC: No —

WONG: If things are to be done in Malaysia.

[38] Not only that, PW1 had also acknowledged that the authentication form in the impugned PA was different from the prescribed form in the Act (see NOP (Vol 1) p 11):

KKC: So, Mr Wong, you testified earlier that you are familiar with the provisions of the Powers of Attorney Act. Would you agree with me that the wordings of this attestation clause is (sic) not the same as that is required or prescribed under the Powers of Attorney Act? Or you prefer for me to share with you the Schedule 1?

WONG: Yes, it's different, looks different.

KKC: It's different, right?

WONG: Yes.

[39] When asked by the defendants' counsel during trial, PW1 agreed that the authentication form in the impugned PA did not state the details he had averred/certified in his statutory declaration dated 26 August 2021 (see NOP (Vol 1) pp 37–38):

ML: Now, we will find that you have certified. You see paragraph 2, you say here, 'I hereby certify' these three things which you say, yes? These are the three things, Mr Wong, that are missing from page 9 of the disputed power of attorney. Would you agree?

WONG: Yes.

ML: So you are affirming this statutory declaration in August 2021 about 77 months after the disputed power of attorney was said to be notarised in 5 March 2015, correct?

WONG: Can you repeat the question?

ML: What you have said in paragraph 2 of your statutory declaration —

WONG: Yes.

[40] The plaintiffs in their submission postulated that although there was deviation from the attestation clause set out in Form I, there is no law to say that such deviation will render the present attestation clause somehow invalid. Instead, s 62 of the Interpretation Acts 1948 and 1967 expressly allows for deviations from forms so long as 'the deviation has no substantial effect and is not calculated to mislead'. The plaintiffs further argued that the deviation has no substantial effect as all of the particulars required in the attestation clause of Form I were there.

[41] The plaintiffs heavily relied on the judgment of *KHK Development Sdn Bhd v Majlis Perbandaran Padawan* [2021] MLJU 97 to support the premise that: 'the legal effect of a power of attorney is derived from two distinct source, which are the Power of Attorney Act 1949 and the Contracts Act 1950'. In other words, according to the plaintiffs, even if the impugned PA is not valid under the Act, it is still valid under the Contracts Act 1950.

[42] However, as mentioned earlier, I find that the impugned PA has deviated substantially from the prescribed wordings in Form I. Moreover, I find the plaintiff's reliance on *KHK Development Sdn Bhd* flaws due to several reasons. Firstly, *KHK Development Sdn Bhd* is a decision of the High Court of Kuching where the Act does not apply. It is apt to note the Act only applies to all states in Peninsular Malaysia.

[43] Secondly, the PA in *KHK Development Sdn Bhd* was not invalid for want of proper authentication. Rather, as the PA ceased to be effective pursuant to s 112(3) of the Sarawak Land Code, the Sarawak land authorities refused to carry forward the PA to the new sub-divided titles by reason of the expiry or surrender of the lease. Hence, it was in that context that the PA in *KHK Development Sdn Bhd* was held to be a valid contract of agency which entitled the plaintiff to register a fresh PA vis a vis the sub-divided titles. This issue does

not arise in the present case and should have no bearing on this action.

[44] Besides, even if one is to take the plaintiff's argument (relying on s 62 of the Interpretation Acts 1948 and 1967) at its height, one must be mindful that s 62 of the Interpretation Acts 1948 and 1967 only allows for deviations from any forms so long as the deviation has no substantial effect. From the comparison earlier, it is clear that the attestation of the impugned PA had substantially deviated from Form I because most, if not all, of the key components of the attestation stated in Form I have been missing in the attestation of the impugned PA. It is thus my finding that s 62 cannot shield the impugned PA from the fate of being null and void in view that the attestation clause contained therein has deviated substantially from Form I.

No consideration

[45] To add on, it is also the submission of the defendants that the only way the impugned PA could exclude the first plaintiff's rights over the property is if the impugned PA is an irrevocable power coupled with interest in the property, or an assignment of rights in the property, from first plaintiff to the second plaintiff. To this, I agree.

[46] For there to be a power coupled with interest, the power must be given:

(a) for sufficient consideration; and

(b) for the purpose of securing some benefit to the donee, which must be expressly provided in the instrument.

[47] The Court of Appeal in the case of *Sidambaram a/l Torosamy v Lok Bee Yeong (representative to the estate of Soma Sundram a/l Doraiswamy)* [2017] 4 MLJ 570 had delved into a lengthy discussion on the principle of power of attorney coupled with interest. Hamid Sultan JCA held that:

> [19] *A power of attorney coupled with interest to the donee will normally be referred to as irrevocable power of attorney to at least give effect to the intention of the parties which may be expressed or implied within the four corners of the terms of the power of attorney itself.* Learned authors, Berna Collier and Shannon Lindsay on Power of Attorney in Australia and New Zealand on irrevocable power of attorney had this to say:
>
> > The principle that an authority coupled with an interest is irrevocable except with the donee's consent has been recognised for centuries. A good definition of an irrevocable
> >
> > power coupled with an interest may be found in the case of *Clerk v Laurie* [1857] 2 H&N 199; 157 ER 83:
> >
> > > What is meant by an authority coupled with an interest being irrevocable is this — that where an agreement is entered into on a sufficient

consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. (Emphasis added.)

[48] On a plain reading of the impugned PA, this court find that the impugned PA is again invalid because despite it is an irrevocable (as per paras G and H of the impugned PA) power coupled with interest of the property, there is no mention of the consideration at all.

[49] The impugned PA does not state anything to indicate the consideration based on which it was given, let alone stating anything to suggest that it was given,

(a) in consideration that (as alleged) the second plaintiff advanced USD17m to the first plaintiff; and

(b) as security for the moneys so advanced.

[50] This is contrary to the plaintiffs' pleaded case. The pleaded claim is that the second plaintiff had advanced USD17m to the first plaintiff and that this was the 'consideration' in exchange for the first plaintiff giving him the impugned PA. The impugned PA is, however, totally silent on this. Beside such drastic silence in the impugned PA which would render the impugned PA null and void, there was also no solid evidence to establish this.

[51] In fact, during trial, the second plaintiff himself had agreed that there was no evidence in the trial bundles to show his personal loans of USD17m to the first plaintiff (see NOP (Vol 1) p 447).

[52] Ultimately, the source of funds tendered was from Glammarine Offshore (L) Ltd ('Glanmarine'); not the second plaintiff, as testified and established during cross-examination (see NOP (Vol 1) p 451):

ML: But as you have seen last Friday on 7th of October Mr Manoj a lot of these documents show monies being remitted from Glammarine Offshore Labuan Ltd to various entities including Ali for a stated purpose. Correct?

MANOJ: Correct.

ML: In fact you had also included a variety of documents which shows money being paid by International Safe Oils to Glammarine Offshore. These were the credit transaction advice. You remember those?

MANOJ: Yes.

ML: Yes, ok. I'm not going through the documents again. I will not put you through that. We've gone through it already, ok?

MANOJ: Alright.

ML: *Now it was established on the 07/10/2022 that none of the documents state the monies were remitted as personal loans from you to Ali. Correct?*

MANOJ: *Correct.*

ML: *Or the monies if at all were remitted from Glammarine Offshore Labuan Ltd, the company. Yes?*

MANOJ: *Yes, correct.*

ML: *And not you. Correct?*

MANOJ: *Correct.* (Emphasis added.)

[53] On top of that, in the payment advices so tendered, the purpose of such payments had expressly been stated as 'refund of disbursement', 'consultancy fee', or 'management fee' and not loan from the second plaintiff to the first plaintiff (encl 184, pp 10–88).

[54] The second plaintiff then rebutted by arguing that he is the *de facto* owner of Glammarine. However, company search conducted by the defendants on Glammarine showed that one Kiran is the owner and not the second plaintiff (encl 290, pp 3–9). The second plaintiff has also failed to adduce any solid evidence to support his claim that he is the *de facto* owner of Glammarine.

[55] Therefore, with the absence of any evidence to support that the sum of money was loaned from the second plaintiff to the first plaintiff, the second plaintiff's has failed miserably to establish any consideration for the impugned PA. Since the impugned PA has never mentioned any consideration, it is obvious that it is void for lack of consideration. The failure of the second plaintiff to establish or prove the alleged USD17m so loaned by second plaintiff to the first plaintiff further sealed the fate of the impugned PA as invalid and void.

[56] Also, I am in full agreement with the defendants that by virtue of s 92 of Evidence Act 1950, the extrinsic/oral evidence sought to be introduced by the second plaintiff is inadmissible to prove that the impugned PA was given for consideration and as security for moneys advanced by him to the first plaintiff.

[57] As the nature and extent of all the powers and terms are contained in the impugned PA, s 92 Evidence Act bars any oral evidence to contradict, vary, add to, or subtract from the express terms of the written document (see *He-Con Sdn Bhd v Bulyah bt Ishak & Anor (as administrators for the estate of Nor Zainir bin Rahmat, the deceased) and another appeal* [2020] 4 MLJ 662; [2020] 7 CLJ 271).

[58] The rationale for the rejection of parol evidence rule in this case is simply that if oral evidence is admissible to vary or change such legally required document, then the whole fabric of commercial life would fall apart.

[59] I can do no better than to be guided by the judgment of Chang Min Tat FCJ at 233 C-G (left) in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229: '... it means where the terms of a contract have been reduced to writing, as in this particular agreement they had been, the contract could only be proved by the document itself, and it is not open to the respondent to seek to introduce and the judge to admit evidence that would, inter alia, add new terms to it'.

[60] Applying the principle to our case herein, any factual context or factual matrix is irrelevant to determine the purpose of the impugned PA. The second plaintiff's claim was pleaded squarely on the basis that the impugned PA was given as consideration and as security for moneys advanced by the second plaintiff to the first plaintiff. The fundamental question is whether the language of the impugned PA supports that contention. As discussed earlier, a plain reading of the impugned PA and the evidence say otherwise. Hence, the second plaintiff's claim is unsustainable.

[61] On all counts, the impugned PA is null and void due to the defeats and lacks mentioned earlier. On these two defects alone, it is clear to me that the plaintiffs' case, on the balance of probabilities, must be dismissed. However, for the sake of completeness, I shall now discuss the other aspects of this action.

The signing date

[62] Critically, PW7 (namely the second plaintiff himself) agreed in cross-examination that the impugned PA could not be signed in March 2015 (despite the impugned PA was dated 17 March, 2015) as the charge was only created and signed in June 2015, and the charge was only registered in October 2015 (see NOP (Vol 1), p 496):

> ML: Can you just scroll down a little bit. I want to show you that this was signed by Ali Reza. Can you see his name? Yes, as the registered owner of the property. Scroll down please. That's his signature. And it 4 was given in favour of, scroll down. Wira Bangi Sdn Bhd. Can you see that?
>
> MANOJ: I can.
>
> ML: Ok. Can you scroll down, please? Sorry can you just scroll up? One more. Yes, ok. Can you see the date, June 2015? That's the date in which this document was created. Ali Reza signs it on the 19/06/2015 and if you look at the bottom, the solicitor on behalf of Wira Bangi, can you scroll down same page? He also signs it; Mr Ben Lee Kam Foo also signs it on 19/06/2015. Did you see that?

MANOJ: Yes, I do.

ML: Ok. Now with that in mind, Mr Manoj, we can exit this document, please. With that in mind, the Power of Attorney could not have been signed and given to you in March 2015 because No.1, Wira Bangi's charge which you pointed out to Ali a day before on the 16th of March, was only created and signed in June 2015. Agree or disagree?

MANOJ: Agree.

ML: *Power of Attorney could not be signed in March 2015 because Wira Bangi's charge was only registered on Ali's title in October 2015. Agreed?*

MANOJ: *Agreed.* (Emphasis added.)

[63] Contrary to the second plaintiff's case and by his own admission, it was impossible for the impugned PA to be signed and given on 17 March 2015. This has casted doubt on the authenticity of the impugned PA. To confirm this, I must also consider the testimony of the other witnesses.

[64] Based on the totality of evidence on whether the impugned PA was signed on 17 March 2015, this court find that the testimonies of PW1 and PW6 are unhelpful and equivocal. During trial, PW1 candidly testified that a notarial act is authenticated by his signature, official seal, and date which certifies due execution in the presence of a notary public (see NOP (Vol 1) pp 19–20) PW1 also testified that dating a document is a vital part of notarising a document (see NOP (Vol 1) p 29).

[65] However, as premised by the defendants, PW1's evidence seems to suggest that he did not affix the date stamp of '17 MAR 2015' just above where he signed on the execution page of the impugned PA. In PW1's witness statement, he had methodically outlined what he did step-by-step but did not say he placed the date stamp (see PW1's witness statement (encl 310), para 5 of p 2):

Q2: Please explain to the Court the event leading to the execution of the PA by Ali?

A: ...

On the final page of the PA (see page 9 of Enclosure 164), I signed on the line just above the designation of 'Notary Public'. I then placed my notary public stamp on the bottom left of the page, followed by my notary public seal in the middle, and finally my notary public chop (sic) with my relevant details on the bottom right.

[66] Upon further queries during cross-examination, PW1 testified that he had shredded and disposed of the records contained in the notarial register after five years (see NOP (Vol 1) p 22).

[67] Later, PW1 also admitted that without the notarial register, the court cannot verify what actually happened regarding the impugned PA(see NOP (Vol 1), p 23) He also admitted that his only recollection of what documents he had notarized, and whether the impugned PA was signed on 17 March 2015, was purely based on the signature and initials appearing in the disputed document (see NOP (Vol 1), pp 45–46).

[68] Meanwhile, PW6 candidly conceded several vital facts in cross-examination which diminish the probative value of his evidence about he allegedly saw the first plaintiff signed the impugned PA on 17 March 2015. PW6 testified that he was testifying about events that occurred about six years ago and he only recalled the event but not the details. In fact, PW6 candidly testified that he saw the first plaintiff signed many letters but do not know what he had signed at that particular time (see NOP (Vol 1) p 242).

[69] Therefore, there was no concrete proof to show that the impugned PA was signed by the first plaintiff on 17 March 2015. This couples with the admission by PW7 (the second plaintiff) that the impugned PA could not be executed in March has casted more doubt if not vitiating facts to the validity of the impugned PA.

[70] Over and above, I also have to agree with the defendants that PW1's testimony in cross-examination erodes the authenticity of the impugned PA for few reasons. Firstly, PW1 cannot confirm or ascertain whether the first plaintiff executed the impugned PA on 17 March 2015 and admitted that the first plaintiff did not initial on each page of the impugned PA (see NOP, (Vo 1) p 48).

[71] Secondly, PW1 is neither certain nor sure whether the contents of the impugned PA at pp 7–8 were part of the document he purportedly authenticated at p (see NOP (Vol 1) p 51).

[72] Next, it is the defendants' case that the first plaintiff has never granted the impugned PA. This is consistent with the statutory declaration signed by the first plaintiff on 14 September 2016 ('SD') stating:

> ... I have NEVER granted a Power of Attorney or given any authority regarding the abovementioned property or with regard to any of my assets to Manoj Singh and/or Kiran. I further declare that any claims made by Manoj Singh and/or Kiran are untrue and false ... (encl 164 p 103)

[73] Thus, through the SD, the first plaintiff declared and averred that he had never given nor granted any power of attorney to the second plaintiff. This SD by the first plaintiff was witnessed by the fourth defendant.

[74] Interestingly, as a matter of fact, the second plaintiff (PW7) in the course of cross-examination conceded that this SD was signed by the first plaintiff (see: NOP (Vol 2), p 10):

> TKT: Ok, alright. *Are you also contending that your allegation here that Dato Ali Reza did not sign the statutory declarations before Dato' Syed Alwi?*
>
> MANOJ: *He did sign*.
>
> TKT: *He did sign the statutory declarations, is it?*
>
> MANOJ: *Correct.*
>
> TKT: *So you have confirmed that the statutory declarations were signed by Dato Ali Reza, that's your position?*
>
> MANOJ: *Yes, he did sign.* (Emphasis added.)
>
> (See NOP (Vol 2), p 9)
>
> TKT: No, agree or disagree? Did he sign the statutory declarations, agree or disagree? Did Dato' Ali Reza sign the statutory declarations? Because I believe that when you were reading through (b), you did say that Dato' Ali Reza did execute the statutory declarations. Then after I shown you the statutory declarations, which are in question, now I'm posing back the same question, do you agree or disagree?
>
> MANOJ: *I agree.*
>
> TKT: *Agree it was signed by him, correct?*
>
> MANOJ: *Yes.* (Emphasis added.)

[75] Hence, based on the testimonies above, and the fact that the second plaintiff had never challenged the validity of the SD, the only inference here is that the SD is not a fabricated and concocted document as alleged by the second plaintiff in the SOC.

[76] Further, as mentioned earlier, it is important to note that in this SD the first plaintiff has categorically declared and averred that he did not grant any power of attorney to the second plaintiff (see: NOP (Vol 2), p 36):

> TKT: So, in those both scores, will you agree with me on the 14/09/2016, Dato' Syed Alwi secured a confirmation in writing from Dato' Ali Reza that he did not give you a PA, and he did not sign the letter confirming there was a loan from your wife, Kiran? This is a confirmation in writing, agree?
>
> MANOJ: As per his declaration, yes.

[77] Therefore, it is crystal clear from the SD (which the second plaintiff agreed that it was signed by the first plaintiff) that the impugned PA was never given by the first plaintiff to the second plaintiff.

[78] All the above cast doubt on the authenticity of the impugned PA. The burden is on the second plaintiff to prove the validity of the impugned PA. The second plaintiff has failed to do so. Thus, the plaintiff has failed to established his claim on the balance of probabilities.

[79] The next issue to be scrutinised is whether the second plaintiff could commence this action in the first plaintiff's name and in his own name.

[80] It is elementary that a power of attorney must be construed strictly in express terms, or by necessary implication, within the four corners of the document by which any power is conferred. The Apex Court in *Subramania Pillay v Sundarammal* [1968] 2 MLJ 115 approved the principles stated by the Privy Council in *Bryant, Powis and Bryant v La Banque du Peuple; Bryant Powis and Bryant v Quebec Bank* [1893] AC 170 at p 116 (para F–H), where Suffian FCJ held:

> ... powers of attorney are to be construed strictly — that is to say, that where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, *it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication*. (Emphasis added.)

[81] The discussion earlier completes the entire picture about the status of the impugned PA in all aspects: that the impugned PA is null and void. As such, the second plaintiff has never been appointed the attorney of the first plaintiff and he thus has no legal authorities to file this action on behalf of the first plaintiff. The question now remains as to whether the second plaintiff could commence this action in his own name.

[82] During cross-examination, PW7 initially testified that, inter alia, under the impugned PA, he must act in the name of the first plaintiff and he cannot do things for his own benefit (see NOP (Vol 1) pp 485–486):

> ML: Yes, so if you look at page 6 of the Power of Attorney, it says 'Ali Reza do hereby, name, designate, constitute and appoint yourself, Mr Manoj Singh, as my true and lawful attorney in my name, place and stead to do either, any or all of the following. Do you see that?
>
> MANOJ: Yes, I do.
>
> ML: It does not say, you can do things for your own benefit. MANOJ Agreed, ok.
>
> ...
>
> ML: Agree. So if you act under this Power of Attorney, you must act in Ali's name. Agree?
>
> MANOJ: In Ali's name.

ML: That's what the first two paragraphs say. Ok, agreed. MANOJ That's what it says here. Like you said.

...

ML: Correct? I ask you the question again. The scope and extent of what Ali authorised you to do will depend on the wordings of the Power of Attorney. Agreed?

MANOJ: Agreed.

[83] Relevantly, when pressed in cross-examination about the basis upon which the second plaintiff brought the action in his own name, PW7 testified that he commenced this suit because the first plaintiff owed him money (see NOP (Vol 1) p 489). This has totally contradicted the second plaintiff's pleaded case that he commenced the action in his own name based on the impugned PA.

[84] Interestingly, during trial, PW7 was asked for whom he was seeking to recover the property for. It emerged that PW7 did not know whether the recovery of the property through this action was for himself or for the first plaintiff (see NOP (Vol 1) pp 488–489):

ML: No, no, no, are you seeking to recover the property for yourself? Yes, no or I don't know?

MANOJ: Am I to recover the property for myself while the PA was given to me. So recover it for myself. I don't know.

ML: You don't know? Ok.

MANOJ: I believe I don't know.

[85] It begs the question on what is the whole point of the action apart from being a claim filed by a busybody. I am with the defendants on this point: this claim is frivolous and illusory.

[86] Concerning the alleged personal loans owed by the first plaintiff (as alleged by the second plaintiff earlier), the second plaintiff conceded that it was a matter between him and the first plaintiff, yet no legal action has been filed to recover the alleged unpaid loans (see NOP (Vol 1) p 555):

ML: Now any dispute regarding your alleged personal loan is a matter between Ali and you, agree?

MANOJ: Agree.

ML: And you have also told us yesterday, I need a confirmation from you again, there is no evidence in the trial bundles that you have filed any Court action to recover this so-called personal loan between you and Ali, correct?

MANOJ: Correct.

[87] According to the defendants, in view that PW7 was improperly named as the second plaintiff in the action (because he has no personal rights in the property), he has no locus standi to commence this action, and it is a clear abuse of process. The defendants cited an earlier High Court case of *Wee Tiang Kheng & Ors v Ngu Nii Soon & Ors* [1989] 1 MLJ 252 to support their proposition. The defendants further submitted that the second plaintiff does not have locus standi to maintain this action in his personal capacity against the defendants since the second plaintiff did not have any proprietary right on the said property. For this, they relied on the judgment in *Hassnar bin MP Ebrahim @ Asainar v Sulaiman bin Pong & Ors* [2018] 1 MLJ 346.

[88] I find the judgment in *Wee Tiang Peck v Teoh Poh Tin* [1995] 1 MLJ 446 instructive, where Idris Yusoff J held at p 454 (para E-F):

> A 'power of attorney' is defined as a formal instrument by which one person empowers another to represent him or act in his stead for certain purposes, see *Jowitt's Dictionary of English Law* (2nd Ed). *Such instrument must be strictly construed according to well recognized rules.* Once a power of attorney is created, the relationship of principal and agent arises between the donor and the donee of the power. In no case could the authority of the donee exceed the power of the donor to act on his own behalf. In all cases, the donee of the power owes the donor duties of a fiduciary character, eg to keep accounts of all transactions that transpired and must also be prepared to produce them to the donor at all times, to disclose any conflict of interest and not to receive any secret commission or bribe — see 1(2) *Halsbury's Laws of England* (4th Ed) at para 87. *If a person is acting under the power of attorney, he should as a general rule, act in the name of the donor of the power and likewise if he is authorized to sue on the donor's behalf, the action should be brought in the donor's name.* (Emphasis added.)

[89] Applying the above judgment to our case herein, if at all, the second plaintiff is commencing this action on behalf of the first plaintiff by virtue of the impugned PA, this action should be brought in the donor's name, that is first plaintiff's name. It does not give the second plaintiff the power to commence this action in his own name.

[90] The impugned PA therefore only gives the second plaintiff the authority to deal with the first plaintiff's assets and do not in any way whatsoever secure any personal benefit and rights of the second plaintiff over the property. To be able to sue in his own capacity, the second plaintiff must establish that he has personal benefit and rights over the property that he must secure. This, he has failed to do. Therefore, the commencement of this action is wrong on all counts.

A SPA AND FORM 14A

[91] The second plaintiff had challenged the validity of the SPA and Form 14A that transferred the property to the first and second defendants. The second plaintiff has levelled four arguments regarding the authenticity of the SPA:

B

(a) the propriety of the sale consideration of RM15m;

(b) the formatting and pagination of the copy of the SPA suggest tampering of the pages with only the first and 16th page of the SPA carrying page numbers but not the pages in between;

C

(c) the third defendant (Kevin) acted for both the vendor (Ali) and the purchasers (the first and second defendant) in conflict of interests; and

D

(d) Ali did not sign the SPA on 23 March 2016 as he had left Malaysia on 22 January 2016.

[92] I find that these allegations are bare accusation evidently. The main reason is that the second plaintiff had admitted, while testifying during trial, that the SPA is real (see NOP (Vol 1) p 625):

E

> ML: Ok. So, having showed you all those transactions, I went through no less than 40, about 40 events and 40 transactions referenced to documents, correspondence, Court documents, Court orders, cheques, stamp duty certificates, payment of stamp duty, RPGT, right? *This sale and purchase transaction for the sale of property from Ali to Chew and wife was as real as it was. Agree or disagree?* Based on the documents I just showed you.
>
> MANOJ: *Yes, based on documents, yes, I agree*. (Emphasis added.)

F

[93] The second plaintiff appeared discontent with the sale consideration for the property at RM15m. However, he who asserts must prove. I find that the second plaintiff has failed to discharge his burden of proof to establish that the property was sold undervalue.

G

[94] In fact, the second plaintiff himself readily testified in cross-examination that the inland revenue's market value for the property of RM15m matched the purchase price of RM15m stated in the SPA (see NOP (Vol 1) p 612):

H

> MANOJ: Yes, I can.
>
> ML: Nilai pasaran is market value. As far as LHDN Malaysia was concerned the market value was RM15 million, which matched the purchase price of RM15 million.
>
> MANOJ: Exactly.
>
> ML: Which was stated in the SPA. Yes?

I

MANOJ: Yes.

[95] On top of everything, there is no evidence in the trial bundles of any valuation report obtained by the second plaintiff to show what the market value of the property should be. Thus, his ambush on the SPA fails.

[96] The second plaintiff also questioned the validity of Form 14A which effected the transfer of the property from the first plaintiff to the first and second defendants. Effectively, the second plaintiff alleged that in view that Form 14A was executed by the first plaintiff and witnessed and attested by the third defendant on 14 September 2016 outside Malaysia, it is in contravention of s 211 of the NLC.

[97] The second plaintiff also argued that the first plaintiff's signature in Form 14A is a forgery. However, it is significant to note that the first plaintiff himself is not disputing the fact that he signed Form 14A. The video recording determines this point conclusively (encl 162).

[98] In this regard, relevant guidance can be gleaned from the case of *Wee Huay Fong v Pentadbir Tanah, Klang & Anor* [2002] 3 MLJ 572, where Zulkefli J (as His Lordship then was) considered that the mischief of Section 211 was to prevent forgery. That is to say, if the person executing the instrument was in fact genuinely that particular person, even though the instrument was not attested as prescribed by law, there is no breach of s 211 of the NLC and the instrument is not a void instrument, and once registered, it becomes indefeasible.

[99] Although *Wee Huay Fong* concerns primarily with Form 16A, I agree with the defendants that the ratio must apply by analogy to uphold the validity of Form 14A in this action.

[100] The first plaintiff could not testify during trial in view of his jail term in Iran. In place of this, the defendants tendered the video recording showing him executing the SPA and Form 14A. After scrutinizing the video, this court is of the view that the allegation that Ali's signature in Form 14A was forged is baseless. Also, the plaintiff has not tendered any evidence other than mere allegation to establish that the signature was forged. No signature expert report, for instance, was tendered. Nor has any signature expert been called during trial. On the contrary, the video proves beyond any shadow of doubt that it was the first plaintiff who signed Form 14A. This was also admitted by PW7 during cross-examination (see NOP (Vol 1) p 610):

[101] PW7 also confirmed that that the first plaintiff had signed Form 14A in

the presence of the third defendant (see NOP (Vol 1) pp 611–612):

> ML: And you can see, during the video that we played just now that Kevin had explained the nature of the document that Ali was going to sign, which was for the transfer of the property.
>
> MANOJ: Correct.
>
> ML: That document was signed by Ali Reza on 14/09/2016 in Kevin's presence, and he signed it as the owner of the property, yes? That's what the Form 14A is about.
>
> MANOJ: Correct.
>
> ML: By the Form 14A, Ali intended to sell the property to Chew and wife.
>
> MANOJ: Correct, sir
>
> ML: Yes, yes. Now, based on the video recording that we just saw, Mr Manoj.
>
> MANOJ: Yes.
>
> ML: Kevin saw Ali signed the Form 14A, correct?
>
> MANOJ: Correct.
>
> ML: Ali signed the Form 14A in Kevin's presence. Correct?
>
> MANOJ: Yes, sir.
>
> ML: When Ali was signing copies of the Form 14A, you can remember, he signed two sets, Ali wished the best to Mr Chew and his family. You heard that, right?
>
> MANOJ: Yes, I did.
>
> ML: Yes, and he said they will have good days in that beautiful property. Those were his words.
>
> MANOJ: Yes

[102] At the end of the day, since the second plaintiff accepts that the first plaintiff had in fact signed Form 14A in the third defendant's presence, the mischief and purpose of s 211 of the NLC have been fulfilled. Moreover, the transferor who had executed the form (Form 14A) never denied that he had executed the form (Form 14A) and had indeed confirmed via the video recording that he was happy to transfer the property. He had even wished the transferees (first and second defendants) the best. Accordingly, there is no breach of s 211 of the NLC and Form 14 is therefore a valid instrument, and once registered it has become indefeasible under s 340(1) of the NLC, in favour of the first and second defendant. Hence, the first and second defendants have the indefeasible title to the property.

CLAIM OF CONSPIRACY TO INJURE

[103] According to the SOC, the second plaintiff has alleged that all of the defendants have conspired to injure the second plaintiff through unlawful means by carrying out the following purported unlawful acts, namely:

(a) first plaintiff did not execute the fourth defendant's PA in favour of fourth defendant; and

(b) first plaintiff did not sign the statutory declarations which were purported attested by fourth defendant.

[104] It is to be noted at the outset that for any claim under conspiracy, it must be strictly pleaded and each element of the tort must be fully particularised (see *Repco (M) Sdn Bhd v Tan Toh Fatt & Ors* [2013] 7 MLJ 408).

[105] His Lordship KN Segara JCA in *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394 articulated that one must plead and state precisely the agreement between the defendants to conspire and the purpose or objects of the alleged conspiracy (see also *Loh Chun Hoo v Loh Chun Hoo & Ors* [2022] 1 LNS 25).

[106] It is the second plaintiff's burden to prove that the acts which were carried out by the defendants were unlawful and with the objective of injuring the second plaintiff's purported right and interest on the said property (see *Cubic Electronic Sdn Bhd v MKC Corporate & Business Advisory Sdn Bhd and another appeal* [2016] 3 MLJ 797).

[107] It is important to note that the first plaintiff was not named as a co-conspirator together with the defendants and that first plaintiff did not testify at trial to substantiate the second plaintiff's allegations in the SOC. Nor has the second plaintiff produced any evidence to substantiate his accusation.

[108] The crux of the second plaintiff's pleaded case is that the fourth defendant together with the other defendants had unlawfully and /or fraudulently conspired to injure the second plaintiff by unlawful means in depriving the second plaintiff's rights to the property. However, he has not tendered any proof to establish this.

[109] It is an essential ingredient in an action of conspiracy to injure to prove that the wrongdoers have an intention to cause harm on the innocent party and the acts which were carried out by the defendants were unlawful (see *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd (previously known as Reetaj City Centre Sdn Bhd and formerly known as KFH Reetaj Sdn Bhd) & Anor* [2013] 7 MLJ 437). As such, the burden is on the second plaintiff to also prove that there was an intention to injure by the fourth defendant together with the other defendants. Nevertheless, it is the finding of this court that the claim for conspiracy to defraud is not actionable for the second plaintiff had failed to prove the elements to a conspiracy claim for few reasons. Based on the extensive evidences presented before this court, the first plaintiff

A and the defendants had acted lawfully in the conveyancing transaction in effecting the transfer of the property to the first and second defendants in consideration of RM15m.

B **[110]** In addition, the third defendant had attended to the drafting, preparation and execution of the SPA and Form 14A for the sale of the property in good faith for the legitimate purpose of acting pursuant to, and in accordance with first plaintiff's instructions to sell the property to the first and second defendants. The fourth defendant, on the other hand, has been authorised as the attorney of the first plaintiff. All of them had performed their C respective roles and duties with legitimate causes. Hence, there is no basis/evidence to support the accusation that the defendants had conspired to injure the second plaintiff.

D **[111]** In any event, as second plaintiff did not have any security rights in the property, there was simply nothing to injure the second plaintiff.

CONCLUSION

E **[112]** In summary, due to the incompliance of the impugned PA with numerous requirements of the Act and decided cases, the impugned PA is invalid. This is further strengthened by the SD witnessed by the fourth defendant. The second plaintiff, therefore, has no authority to initiate this action on behalf of the first plaintiff. Since the second plaintiff's legal claim is F founded on his role as a donee pursuant to the impugned PA, his claims are unsustainable.

[113] In similar veins, since the second plaintiff could not establish his G personal rights over the property, his claim in this action in his personal capacity is again, without basis.

[114] Besides, the absence of the first plaintiff, makes it not feasible to establish the elements of conspiracy as claimed by the second plaintiff. The H second plaintiff has also failed to establish, provide and prove the particulars and elements of this conspiracy to injure.

[115] Thence, the plaintiffs' claim is hereby dismissed with cost of RM65,000 to be paid by the plaintiffs to the first and second defendant, and cost of I RM60,000 to the third and fourth defendants respectively. All costs are subject to allocator.

Plaintiffs' claim dismissed with costs of RM65,000 to be paid by plaintiffs to first

and second defendants, and costs of RM60,000 to be paid by plaintiffs to third and fourth defendants respectively; all costs were subject to allocatur.

Reported by Dzulqarnain Ab Fatar